UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CHESTER PARK VIEW, LLC, and LAZAR OSTREICHER,

Plaintiffs,

v.

BEN SCHLESINGER, MARVIN LIPSCHITZ,· a/k/a MARVIN LIPSHUTZ, MORDECHAI BECK and MEIR BERGER,

Defendants.

----------x

23 Cv. 5432 (CS)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THE FIRST AMENDED COMPLAINT ON BEHALF OF DEFENDANTS BEN SCHLESINGER AND MARVIN LIPSCHITZ

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INTRODUCTION

This memorandum is respectfully submitted in support of the application of defendants Ben Schlesinger ("Schlesinger") and Marvin Lipschitz ("Lipschitz") for an order, pursuant to Fed. R. Civ. Pro. 12(b)(6), dismissing the first amended complaint (the "Complaint" or "FAC") for failure to state a RICO claim, and on other grounds.

The Complaint, as it relates to these two defendants, centers on their alleged breach of a contract [Exhibit 1 to the Complaint], dated May 5, 2022, in which, acting on behalf of a New York corporation, Anshei Sfard D'Monsey, Inc. ("ASD Inc."), they agreed to assign the mortgage on a Rockland County property ("the Property") owned by a religious corporation, Anshei Sfard D'Monsey ("ASD"), to plaintiff Chester Park View, LLC ("CPV"). The contract also provided that Schlesinger and Lipschitz would transfer

control of the religious corporation to plaintiff Lazar Ostreicher and individuals affiliated with him.

Schlesinger and Lipschitz were prohibited from taking the actions contemplated by the contract by a temporary restraining order ("TRO") issued in a New York state court action that was initiated against them and the present plaintiffs by present co-defendant Mordechai Beck on May 13, 2022.[1] The papers submitted in support of the application for the TRO included documents indicating that Schlesinger and Lipschitz lacked authority to enter into the contract on behalf of ASD Inc. and that, twenty years earlier, Beck had acquired an interest in the Property and the religious corporation. The gravamen of the Complaint is plaintiffs' contention that those documents are fraudulent and that they have been utilized to deprive the plaintiffs of the rights with respect to the Property and ASD to which they are entitled under the contract.

The invocation of federal RICO jurisdiction to resolve such a dispute illustrates how "the allure of treble damages, attorney's fees, and federal jurisdiction presents a powerful incentive for plaintiffs to attempt to fit 'garden variety fraud' claims within the standard of civil RICO," *Rosenson v. Mordowitz*, 11 Cv. 6145 (JPO), 2012 WL 3631308,

[1]The TRO, which was issued by Hon. Rolf M. Thorsten, Acting Justice of the Supreme Court, Rockland County, on June 1, 2022, appears as NYSCEF Document 112 on the docket of that state court action, *Anshei Sfard DMonsey v. Anshei Sfard DMonsey Inc et al*, Index No. 032153/2022 (Rockland County) (accessible at https://iapps.courts.state.ny.us/webcivil/FCASeFiledDocsDetail?county_code=9P775HMLW2S2HUhF9pHe2A%3D%3D&txtIndexNo=siEJSb2YLaIJenD4a0NTSA%3D%3D&showMenu=no&isPreRji=N&civilCase=8_PLUS_EJ7%2F6icgo_PLUS_KNEWIJK2UQ%3D%3D).

at *4 (S.D.N.Y. Aug. 23, 2012), and why federal courts must accordingly be "wary of putative civil RICO claims that are nothing more than sheep masquerading in wolves' clothing." *Kirk v. Heppt*, 423 F.Supp.2d 147, 149 (S.D.N.Y.2006).[2] As the court in *Gross v. Waywell*, 628 F. Supp. 2d 475, 482 (S.D.N.Y. 2009), explained:

> By filing actions in federal courts that fall short of RICO's substantive threshold, plaintiffs often seek the courts' exercise of federal jurisdiction over litigation that more properly falls within the province of state law remedies. Exercise of federal court jurisdiction in such cases, especially those that rely on nothing more than incidental use of the mails or wires in furtherance of a simple fraudulent scheme with few victims and narrow impacts, would threaten to federalize garden-variety state common law claims, and offer a remedy grossly out of proportion to any public harm or larger societal interests associated with localized wrongful conduct ordinarily involved in such actions.

See also Fuji Photo Film U.S.A. v. McNulty, 640 F.Supp.2d 300, 308-09 (S.D.N.Y.2009) ("Civil RICO should not be used to transform a garden variety fraud or breach of contract case . . . into a vehicle for treble damages").

The Memorandum of Law submitted on behalf of co-defendants Beck and Berger ("the Co-defendants' Memorandum") sets forth the multiple respects in which the Complaint falls below the baseline standard for pleading a civil RICO claim, including its failure to allege a "pattern" with the requisite "continuity," its misplaced reliance on litigation activity as predicate acts, and its failure to allege with the requisite particularity conduct that would establish wire fraud. To avoid unnecessary repetition, we rely on and

[2]Unless otherwise indicated, quotations in this memorandum omit all internal alterations, quotation marks, footnotes, and citations.

incorporate by reference the legal analysis and arguments advanced in those papers. Based on those arguments, insofar as they are applicable, as well as those presented below, the Complaint should be dismissed as to defendants Schlesinger and Lipschitz.

ARGUMENT

POINT ONE

THE COMPLAINT DOES NOT ADEQUATELY PLEAD A RICO CLAIM AGAINST SCHLESINGER OR LIPSCHITZ

In its First Claim, which asserts a violation of the civil RICO statute [18 U.S.C. § 1962(c)], the Complaint alleges that ASD is an "enterprise" and that Schlesinger and Lipschitz conducted and participated in its affairs through a pattern of racketeering activity for the purpose of intentionally defrauding the plaintiffs. Complaint, ¶¶ 121-23. It specifies the following as predicate acts of wire fraud in violation of 18 U.S.C. § 1343:

> Schlesinger's and Lipschitz's execution of the contract with CPV while over Zoom . . . . [¶ 120] ("Act 1")
>
> Defendants' creation and electronic transmission of the Fraudulent Meeting Minutes . . . .[¶ 121] ("Act 2")
>
> Beck's creation and electronic transmission of the Fraudulent Certificate. . . . [¶ 122] ("Act 3")
>
> Defendants' creation and electronic transmission of the Fraudulent Agreement. . . . [¶ 123] ("Act 4")

> Schlesinger's execution and filing of the Satisfaction of Mortgage . . . . [¶ 124] ("Act 5")
>
> Defendants' direction to others, in particular, Blum, to email Rabbi Ostreicher while Rabbi Ostreicher was in Israel to mislead him about Beck's willingness to participate in the Bais Din . . . . [¶ 126] ("Act 6")

The Complaint also alleges that the defendants engaged in "predicate acts" by "[using] the Property and ASD under the shield of New York's Religious Corporation Law, when there was no congregation, no bank account for ASD and no operating documents for ASD " [¶ 125], but it does not allege that this constituted wire fraud or any other offense listed under the definition of "racketeering activity" in 18 U.S.C. § 1961(1).

A. The Requirements for Pleading Wire Fraud as a RICO Predicate

A complaint alleging wire fraud as the predicate act of a RICO claim must show "(1) the existence of a scheme to defraud; (2) defendant's knowing or intentional participation in the scheme; and (3) the use of interstate . . . transmission facilities in furtherance of the scheme." *Sykes v. Mel Harris and Associates*, LLC, 757 F. Supp. 2d 413, 425 (S.D.N.Y. 2010). Because a complaint alleging fraud must also satisfy the pleading requirements of Fed. R. Civ. Pro. 9(b), the plaintiff must "adequately specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements." *Lundy v. Cath. Health Sys. of Long Island Inc*., 711 F.3d 106, 119 (2d Cir. 2013). It must also "plead those events

which give rise to a strong inference that the defendant[ ] had an intent to defraud, knowledge of the falsity, or a reckless disregard for the truth." *Cohen v. S.A.C. Trading Corp*., 711 F.3d 353, 359 (2d Cir. 2013). *See also Crawford v. Franklin Credit Mgmt. Corp*., 758 F.3d 473, 489 (2d Cir. 2014)("RICO claims premised on mail or wire fraud must be particularly scrutinized because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it").

B. The Complaint Does Not Adequately Plead Any Legally Cognizable Claim of Wire Fraud Against Schlesinger or Lipschitz

As discussed in the Co-Defendant's Memorandum at page 12, Acts Two, Three, and Four, which concern the filing of documents in support of the state court application for a TRO, are "litigation activities," which cannot constitute RICO predicates of wire fraud. Additionally, Act Three is attributed solely to an individual referred to as "Beck" (and identified elsewhere in the Complaint as "Morcha Beck," who, according to the plaintiffs, may or may not be an "actual person," [FAC, ¶ 67)]), while Acts Two and Four refer only to the undifferentiated "Defendants." As a consequence, the allegations regarding the latter two predicate acts fail to satisfy the heightened standard of pleading fraud "with particularity" [Rule 9(b)], which requires that the plaintiff "specify the content, date, and place of any misrepresentations, and the identity of the persons making them," *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172-73 (2d Cir. 1990), and that "[w]here there are multiple defendants, the plaintiff must allege facts specifying each

defendant's contribution to the fraud." *DiVittorio v. Equidyne Extractive Indus., Inc*., 822 F.2d 1242, 1247 (2d Cir. 1987).

Act 6, concerning alleged efforts to mislead Ostreicher about Beck's willingness to participate in a Bais Din, is similarly defective because it refers only to the undifferentiated "Defendants." It should also be noted that, earlier in the First Claim, the Complaint attributes the conduct underlying this alleged predicate solely to co-defendants Beck and Berger [FAC, ¶ 117(h)] and that, in the preceding narrative, it refers only to Beck as the perpetrator of this alleged fraud. *See* ¶ 47.

For the reasons discussed below, the only two acts that are specifically attributed to Schlesinger and/or Lipschitz also fail to rise to the level of RICO predicates, and thus do not support a claim that these defendants conducted the activities of an enterprise "through a pattern of racketeering activity" [§ 1962(c)].

1. The Allegations Concerning Act 1 (Schlesinger's and Lipschitz's Execution of the Contract With CPV) Are Insufficient to Plead Wire Fraud as a RICO Predicate

The plaintiffs do not explain how they were defrauded by Schlesinger's and Lipschitz's execution of the agreement with CPV. In connection with the state law claim of fraud (plaintiffs' Fourth Claim), the Complaint alleges that the agreement contained the following misrepresentations: (a) that Schlesinger and Lipshitz were the sole shareholders, officers and directors of ASD Inc; (b) that they were the sole Trustees of ASD; (c) that the execution of the agreement was fully authorized by ASD Inc.; (d) that

Schlesinger and Lipshutz had authority to bind ASD Inc.; and (e) that there were no pending agreements, transactions or negotiations with ASD Inc that would void the agreement with CPV. [FAC, ¶ 144] As noted above, when pleading a cause of action sounding in fraud, the plaintiff must not only "specify the statements it claims were false or misleading," but must "give particulars as to the respect in which plaintiff contends the statements were fraudulent." *Lundy*, 711 F.3d at119.

Not only does the Complaint fail to explain the basis for its contention that the representations in the contract were "false or misleading," its central premise is that each of these statements was *true* and that the documents suggesting otherwise are "fraudulent." *See*, e.g. FAC, ¶ 24 ("So, as of January 1, 2002, the sole remaining ASD trustees were Marvin Lipschitz and Ben Schlesinger, who remained the sole ASD trustees through December 23, 2021"); ¶ 28 ("Again, since 2002, Schlesinger and Lipschitz had been the only two trustees of ASD and so had total control over ASD"); and ¶¶ 57-85 (characterizing the documents submitted in state court to establish that Schlesinger and Lipschitz were not the sole trustees of ASD or the sole officers of ASD Inc., and that Beck had acquired an interest in ASD and the Property as the "Fraudulent Meeting Minutes," the "Fraudulent Certificate," and the "Fraudulent Agreement"). Thus, accepting all statements in the Complaint as true, as it must when considering a motion to dismiss, *Lotes Co. v. Hon Hai Precision Industry Co.*, 753 F.3d 395, 403 (2d Cir. 2014), the Court should recognize that the plaintiffs have not satisfied the standard for pleading

that the contract included false representations. On the contrary, the overarching theory of the Complaint is that those statements were true.

In addition, although Rule 9(b) permits intent and other states of mind to be "averred generally," a plaintiff must nonetheless "allege facts giving rise to a strong inference of fraudulent intent, which may include facts showing that the defendant(s) had both motive and opportunity to commit fraud, or facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290–91 (2d Cir.2006); *see also O'Brien v. Nat'l Prop. Analysts Partners*, 936 F.2d 674, 676 (2d Cir.1991) (inference of scienter must be supported by "ample factual basis"). Here, the plaintiffs offer no basis for inferring that Schlesinger and Lipschitz intended to injure the plaintiffs in their property rights when they entered into the contract, or that they had any motive to do so. Notwithstanding its vague suggestion that "[e]ven while Schlesinger and Lipschitz were selling the ASD Note to CPV and control over ASD to Rabbi Ostreicher, Beck, Schlesinger and Lipschitz were working to cement Beck's control over ASD," [FAC, ¶ 45], the Complaint does not offer any substantive basis for concluding that Schlesinger or Lipschitz contemplated a sale to Beck (or that Beck indicated any interest in acquiring control of the Property) prior to the execution of the contract with the plaintiffs on May 5, 2022. *See* FAC, ¶ 46 (alleging that Ostreicher learned of Beck's interest in the Property after the May 5th transaction) and ¶¶ 51-52

(alleging that Schlesinger stated on May 9, 2022, that he would sell to Beck if he was willing to pay more than Ostreicher).

In any event, even if the Complaint contained sufficient allegations to support a claim that Schlesinger and Lipschitz did not intend to fulfill their obligations under the agreement at the time they entered it, that would not turn the signing of the contract into a predicate act of wire fraud. *See*, e.g. *Faryniarz v. Ramirez*, 62 F. Supp. 3d 240, 253 (D. Conn. 2014)("a false promise by a party to a contract that he will fulfill the terms of an agreement, [ ] does not constitute predicate criminal activity in [the RICO] context") (citing *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 19-20 (2d Cir. 1996)).

2. The Allegations Concerning Act 5 (Schlesinger's Execution and Filing of an Assignment of Mortgage) Are Insufficient to Plead Wire Fraud as a RICO Predicate

The Complaint's entire discussion of the fifth alleged predicate act consists of the following paragraph:

> On or about July 13, 2022, Schlesinger executed a satisfaction of mortgage on behalf of himself and ASD Inc. of the ASD Note – the very same note he had sold to CPV just over two months prior – further assisting Beck and the enterprise with the attempted to transfer of control over ASD and the Property to Beck and his cronies, which note was filed with the County Clerk in Rockland County. [FAC, ¶ 108]

This conduct does not involve any false or misleading statement – or, indeed, any statement whatsoever – that was communicated to the plaintiffs or that they could

arguably have relied on to their detriment. Nor does it involve any use of interstate wires. Thus, it does not in any way assert a plausible cause of action for wire fraud.

Moreover, the only injury the plaintiffs assert with respect to this conduct is one that arises from an alleged breach of Schlesinger's and Lipshitz's agreement to assign the mortgage to CPV. Under the doctrine announced by the Second Circuit in *Bridgestone/Firestone, Inc*., 98 F.3d at 19-20, such an injury cannot support a RICO predicate based on fraud. *See Bayshore Cap. Advisors, LLC v. Creative Wealth Media Fin. Corp*., 22 Cv.1105 (KMK), 2023 WL 2751049, at *24 (S.D.N.Y. Mar. 31, 2023)("A plaintiff asserting fraud based on a counterparty's allegedly false promise to perform must: (i) demonstrate a legal duty separate from the duty to perform under the contract; (ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract; or (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages"). *See also Negron v. Cigna Health & Life Ins*., 300 F. Supp. 3d 341, 364 (D. Conn. 2018) ("In the RICO context, the statement upon which the fraud is predicated must be more than a false promise by a party to a contract that the party will fulfill the terms of the agreement").

C. The Complaint Does Not Adequately Allege a RICO Conspiracy

Because the Complaint does not meet the standard for pleading a substantive RICO violation by Schlesinger or Lipschitz, it also fails to support a claim that they engaged in a conspiracy in violation of § 1962(d), as alleged in its Second Claim [¶¶ 134-

39]. *See Bayshore Cap. Advisors*, 2023WL 2751049, at *28 ("because Plaintiffs have not sufficiently stated a substantive RICO claim under § 1962(c), Plaintiffs' conspiracy claim fails as a matter of law"). As shown in the Co-Defendants' Memorandum, at pages 17-21, the Complaint contains no factual allegations that would establish a conspiracy to cause "investment" or "acquisition" injury under Section 1962(a) or (b). Rather, it merely recites the statutory language relating to conspiracies with those objects. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)(to survive a motion to dismiss, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice").

POINT TWO

THE STATE LAW CLAIM OF FRAUD SHOULD BE DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION

For essentially the same reasons as those discussed in Point One(B)(1), *supra*, with respect to the plaintiffs' effort to plead a predicate act of wire fraud based on Schlesinger's and Lipschitz's execution of the contract with CPV, the plaintiffs' Fourth Claim [Complaint, ¶¶ 147-52] also fails to state a plausible cause of action for fraud under New York state law. The elements of such a cause of action require "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009). As we have shown, rather than demonstrating a

"material misrepresentation of fact," the Complaint alleges that the contract contained representations that, according to the plaintiffs, are true.

Additionally, in New York it is "well settled that where . . . a claim to recover damages for fraud is premised upon an alleged breach of contractual duties and the supporting allegations do not concern representations which are collateral or extraneous to the terms of the parties' agreement, a cause of action sounding in fraud does not lie." *McKernin v. Fanny Farmer Candy Shops, Inc*., 176 A.D.2d 233, 234 (2d. Dept. 1991). *See also Sudul v. Computer Outsourcing Servs*., 868 F.Supp. 59, 62 (S.D.N.Y.1994) (under New York law, "where a fraud claim arises out of the same facts as plaintiff's breach of contract claim, with the addition only of an allegation that defendant never intended to perform the precise promises spelled out in the contract between the parties, the fraud claim is redundant and plaintiff's sole remedy is for breach of contract").

POINT THREE

IF THE RICO CLAIMS ARE DISMISSED, THE COURT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION OVER THE STATE LAW CLAIMS

The Complaint asserts that this Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. §1367 [FAC, ¶ 7]. Under that statute, "the district court [ ] may decline to exercise supplemental jurisdiction over a claim . . . if the district court has dismissed all claims over which it has original jurisdiction" [§ 1367(c)(3)]. In exercising its discretion under that statute, a district court may "weigh and balance several

factors, including considerations of judicial economy, convenience, and fairness to litigants." *Purgess v. Sharrock,* 33 F.3d 134, 138 (2d Cir.1994). "When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988). *See also Lundy*, 711 F.3d at 118 ("Once all federal claims have been dismissed, the balance of factors will usually point toward a declination").

In the present case, there has been no discovery and no litigation other than the filing of motions to dismiss. Additionally, the Court may take judicial notice that plaintiffs' claim of breach of contract (which is the only viable state law claim, *see* Point Two*, supra*) is currently pending as a crossclaim filed against Schlesinger and Lipschitz in the Supreme Court, Rockland County.[3] In *Zohar CDO 2003-1, Ltd. v. Patriarch Partners, LLC*, 286 F. Supp. 3d 634, 653-55 (S.D.N.Y. 2017), the pendency of a duplicative action in state court was among the factors leading to the court's conclusion that "interests of economy, convenience, comity, and fairness weigh against exercising supplemental jurisdiction" over state law claims. The same conclusion is warranted here.

[3]The state court filing, *Anshei Sfard DMonsey v. Anshei Sfard DMonsey, Inc. et al*, Index No. 032153/2022 (NYSCEF Doc. No. 160), which contains the crossclaim at paragraphs 59-65, is submitted as an exhibit accompanying this memorandum.

CONCLUSION

For the reasons discussed above and in the Co-Defendants' Memorandum, the Complaint should be dismissed in its entirety.

Respectfully submitted,

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